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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 58

OXFORD PAPER COMPANY, PETITIONER

v.

STEAMSHIP "NIDARHOLM," A. S. NIDAROS

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

BRIEF FOR OXFORD PAPER COMPANY, PETITIONER

JOHN W. LOWRANCE,
NATHAN W. THOMPSON,
Attorneys for Petitioner.

MARKS PRINTING HOUSE, PORTLAND, ME.

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Opinion of District Court, reported 26 Fed. (2nd) page 92.

Opinion of Circuit Court of Appeals (first opinion), reported 34 Fed. (2nd) 442.

Opinion of Circuit Court of Appeals (second opinion), reported 36 Fed. (2nd) 227.

HISTORY OF PROCEEDINGS

This is an action *in rem* brought by the Oxford Paper Company, a Maine corporation, operator of a large paper mill in Maine, against the Norwegian Steamship Nidarholm, to recover damages as result of a loss of part of a deck cargo of pulp wood belonging to the Oxford Paper Company, from the deck of the Steamship Nidarholm while it was proceeding from Murray, Nova Scotia, to Portland, Maine. The owners of the Nidarholm appeared, filed a claim and bond to release said steamship from

arrest, and subsequently filed a cross libel against the Oxford Paper Company to recover for alleged damage to said ship by reason of the pulp wood striking the side of the ship as it went overboard.

Both actions arose from the same set of facts and were, by order of the District Court, consolidated, and tried together.

The District Court saw and heard all the witnesses, with the exception of two, the Captain and Mate of the Nidarholm, and after due consideration the District Court held that the Nidarholm was *unseaworthy* at the commencement of the voyage in question, that the loss was caused by such unseaworthiness, and the ship was therefore wholly in fault for the loss. Subsequently a decree was entered for the libellant, referring the matter to an assessor to assess the damages, and the cross libel against the Oxford Paper Company by the owners of the Nidarholm was dismissed.

The parties agreed on the damage without the reference, and a decree was entered for the libellant in the amount of $6,428.51. An appeal was taken by the owner of the Nidarholm, and the case was argued in the Circuit Court of Appeals in April, 1929. The Circuit Court of Appeals agreed with the District Court that the Nidarholm was *unseaworthy* at the commencement of the voyage, for which it held the steamer in fault, but that court also held the libellant in fault because it furnished the cribbing to stay the deck cargo, which cribbing gave way, and allowed the deck cargo to go overboard. Thus, the Circuit Court of Appeals held both parties in fault, and divided the damages.

A petition for re-hearing was filed by the libellant, and the Court of Appeals, after some delay, filed a second opinion, affirming its original finding, and denied the petition for re-hearing, but again reiterated its finding of fact that the vessel was *unseaworthy* at the commencement of the voyage.

STATEMENT OF FACTS

There is very little dispute on the facts, and they may be briefly stated as follows:

The Oxford Paper Company, libellant-petitioner for certiorari, hereinafter called libellant, has been engaged in the manufacture of paper in the State of Maine for a long period of time, and is the owner of large timber lands in the Provinces. For a number of years, it has been chartering Norwegian steam vessels for the purpose of carrying pulp wood from Murray, Nova Scotia, to Portland, Maine, from which latter point the pulp wood is forwarded to its mill by railroad.

CHARTER PARTY

In May, 1927, a written charter party was entered into between said Oxford Paper Company and the owners of the Norwegian Steamship Nidarholm, by the terms of which it was agreed that the Oxford Paper Company would have the entire use of said Steamship Nidarholm, except quarters for officers and crew, for a period of three months, in consideration of the payment of $1.55 per d. w. ton per month. The charter party, among other things, contained the following:

> SEC. 8. "That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the owners) shall be under the orders and direction of the Charterers as regards employment or agency; *and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain*, who is to sign Bills of Lading for cargo as presented, in conformity with Mates' or Tally Clerks' receipts." (Italics ours.)

In accordance with the terms of the charter party, the Steamship Nidarholm was turned over to the charterer at New Jersey and was ordered by the charterer to go to Hampton Roads,

Virginia, for the purpose of carrying a load of coal from that port to Port Alfred, P. Q. After receiving a full and complete cargo of coal at Hampton Roads, the Nidarholm proceeded for Port Alfred, P. Q., and thence to Murray, but, on the way, the vessel ran ashore and remained stranded for about four days, during which time it was necessary to lighter a large part of the vessel's cargo and run anchors and use the ship's cables in an endeavor to free the vessel.

The vessel was obliged to go on a railway for repairs, but she finally arrived at the plant of the libellant in Murray, Nova Scotia, where she was immediately made ready to receive cargo.

PREPARATIONS FOR LOADING

Steps were immediately taken to prepare the vessel to receive the pulp wood cargo, and this was done by first placing stanchions, which are wooden poles approximately twenty feet long and eight to ten inches through the butt, around the deck near the rail of the vessel at a distance of approximately four to five feet apart, for the purpose of holding the deck cargo in place. To these stanchions are fastened planks and timbers, thus forming a cribbing to stay the cargo. These stanchions were furnished by the Oxford Paper Company (libellant) and were held in place by wire rope lashings running from the ring bolts in the hatch coamings to approximately the center of the stanchions (see Exhibits 5, 6, pages 187, 188). These lashings were furnished by the ship, and put in place by the ship's crew. An athwartship lashing running from the stanchion on one side opposite the foremast to and around the foremast to the stanchion on the opposite side (see Exhibit 2, page 182) was suggested by the Oxford Paper Company to the master of the steamship. The master declined to follow the suggestion and such lashing was not used on the trip in question, but was used on subsequent trips (Opinion, p. 194; Evidence, p. 35).

After the stanchions and cribbing were in place and fastened, the loading commenced.

LOADING

The loading was done by means of a chute run out over the vessel's deck, and the pulp wood (which was about two feet long and four inches to eighteen inches in diameter) then came up from the pile on an endless chain, ran down the chute, from which it dropped into the vessel. The holds of the vessel were first filled and then the deck load, which was held in place by the cribbing, was placed on board. *The entire loading was done under the direction and supervision of the master of the Nidarholm the District Court so found* (Record, pages 194, 196, 199).

On page 199, Judge Hale said:

> "The proofs show that the master did not intend, or attempt, to delegate his duties with respect to the loading; *he personally supervised and 'bossed' the loading, trimming and securing of the cargo.*" (Italics ours.)

The Circuit Court of Appeals made no special finding on this fact, but the evidence clearly supports the findings of the District Court.

On the first trip, the Captain, who was the servant of the owners, determined when the ship had sufficient cargo and also determined its trim. When the ship was loaded to the Captain's satisfaction she sailed for Portland on her first trip under this charter, where she arrived without mishap; and on her return trip to Murray the stanchions were left standing, and the Captain and Mate of the Nidarholm had every opportunity to examine them (Opinion of District Court, p. 194), and on her arrival back loading was immediately commenced for the second trip.

On the second loading, everything proceeded as on the first until the ship was nearly loaded, when she started to list toward the wharf and act cranky. The stevedore immediately called the Captain, who was then turned in, and he immediately came on deck, and from that time until the loading was completed, the

Captain ordered the cargo trimmed just as he wanted it, and also determined the amount of the cargo, *and insisted, against the advice of the stevedore, on taking more cargo than he had on the previous trip*, and the cargo was heavier (see Opinion of District Court, p. 199; Evidence, Record, pp. 16–18, Q. 49–76).

When the vessel was loaded as the Captain directed she was loaded below her load marks by two and one-half inches.

Under the Captain's orders, considerable cargo was shifted from the starboard side to the port side, so that when the ship sailed there was considerably more cargo on the port side (the side from which the cargo first started to go overboard) than on the starboard side (p. 37, Q. 70; p. 38, Q. 71, 72).

The libellant's foreman suggested to the Captain of the ship that an athwartship lashing be run from side to side opposite the foremast, to help support the cribbing, but the Captain declined or refused to put up such lashing (see Opinion of District Court, p. 194; Opinion of Circuit Court of Appeals, p. 207).

When the loading was completed the ship's docking lines were let go and the ship started on the second voyage (the voyage on which the loss occurred).

ACTION OF SHIP ON LEAVING DOCK AND STARTING TOWARD SEA

When the Nidarholm left the dock, she had a starboard list of approximately five degrees, and as she backed away with her rudder amidships, she would straighten up to an even keel and then gradually drop back to the starboard list. This performance continued until the backing maneuver had been completed; and when the Nidarholm started ahead, she came up on an even keel and slowly listed over to port (Opinion of District Court, p. 188).

It is admitted that the entire loss, as hereinafter mentioned, took place in the smooth waters within the inner harbor of Murray.

Claimant contended in the Court of Appeals that the list in

creased when the vessel got in the shallow water over the bar, but the pilot of the Nidarholm, and the only one on board who was familiar with the location, absolutely denies such fact (p. 59, Q. 56–59).

As the Nidarholm proceeded down the harbor, the port list which she took when she started ahead gradually increased until the vessel was listing from ten to fourteen degrees to port, and each movement of the vessel's helm would cause the list to increase or decrease according to the vessel's course; and shortly following one sharp helm movement, the Nidarholm listed so badly that a part of her deck cargo went over the port side (Opinion of District Court, p. 195). When the weight of this cargo was taken from the port side, the vessel listed sharply to starboard and cleaned off the deck cargo on that side and then continued to roll from starboard to port until the entire deck cargo had been rolled off.

The wood was carried out to sea by an ebb tide that was then flowing, and was practically a total loss.

CAUSE OF ACTION

Upon the arrival of the Nidarholm in Portland, Maine, libel was brought by the Oxford Paper Company to recover the value of the pulp wood, on the ground that the loss was caused by the vessel's unseaworthiness at the commencement of the voyage, by the Captain of the Nidarholm taking on more cargo than the vessel could safely carry, and in not having the cargo properly trimmed. The claimant denied the unseaworthiness of the vessel in one breath, and with another claimed that the cause of the loss was the weak and defective condition of the stanchions, improper position of stanchions, and because the cargo was not properly secured, or *stayed* (see Answer, Record, p. 5).

The libellant contended in the courts below, as it does here.

1. That proper strength of the stanchions, proper placing of the stanchions, and proper staying of the cargo were all necessary to make the ship seaworthy, *and were entirely up to the Captain regardless of who furnished the stanchions or who did the actual loading of the cargo.*
2. That the duty of making a vessel seaworthy is upon the master and owner, and this duty cannot be delegated.
3. That this duty is not in any way lessened by the fact that the libellant furnished the stanchions and did actually load the ship, especially in this case, for everything that the libellant did with reference to the loading was done under the supervision and orders of the master, *whose positive duty it was to have everything shipshape before he permitted his vessel to proceed.*
4. That any loss to the charterer, caused by the failure to have the vessel seaworthy, in all respects, including the proper preparation for and stowing of the cargo, must be borne by the ship owners.

The District Court heard all but two of the witnesses, gave the case great care and thought, made very positive findings of fact, and concluded by holding the ship and her master wholly responsible for the loss.

The Court of Appeals agreed with the District Court that the vessel was unseaworthy, but held that because the libellant furnished the material for, and put up the cribbing to stay the deck cargo, it, too, was in fault for the loss.

BRIEF OF ARGUMENT FOR OXFORD PAPER COMPANY

I

THE CAPTAIN WAS THE SERVANT OF THE SHIP-OWNER SO FAR AS THE LOADING OF THE SHIP WAS CONCERNED.

The charter party, Section 8, reads as follows:

> "8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment or agency; and *Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain*, who is to sign Bills of Lading for cargo as presented, in comformity with Mates' or Tally Clerks' receipts." (Italics ours.)

Thus by the very terms of the charter the master of the ship was the shipowner's servant for the purpose of supervising the loading and stowing of the cargo.

Unless there is an agreement to the contrary, the master is always considered agent of the shipowner, so far as the duty of loading and stowing the cargo is concerned.

In the case of *Harloff, et al.* v. *Barber & Co.*, 150 Fed. 185, on pp. 192, 193, Adams, District Judge, said:

> "'The duty of stowing the cargo in the ship lies on the owner, and on the master as his representative, unless there is an agreement to the contrary. The master ought to be a competent stevedore, and he must see that the stowage is done with skill and care. . . . Moreover, the ship must provide whatever dunnage may be required . . . such as mats, battens, loose wood, etc. These are needful to keep the goods in their places. . . .'

"A chartered vessel in the absence of a special agreement, is required to supply herself with proper fittings for the carriage of lawful cargo."

On this point the District Court, in its opinion in the case at bar, on page 194, said:

"The Captain is presumed to be responsible for the ship without any express provision in the charter; and here there is an express provision in the charter giving him the supervision of the loading."

(a) The Captain did supervise and give positive instructions as to the actual loading and stowing of the cargo.

Of this fact there can be no doubt. It was found as a fact by the District Court, and never seriously questioned by the Court of Appeals. On this point the District Court, on page 197, said:

"*In the case before me, the charter affirmatively makes it the duty of the master to supervise the loading and stowing, and the proofs show that he did actually attend to such supervision.*" (Italics ours.)

On page 194 the District Court further said:

"The proofs are clearly persuasive that the captain exercised his duty of supervision."

On page 199 the District Court further said:

"The proofs show that the master did not intend, or attempt, to delegate his duties with respect to the loading; *he personally supervised and 'bossed' the loading, trimming and securing of the cargo.*" (Italics ours.)

And on page 196:

"Upon the proofs I think the master cannot escape liability from the fact that the loading was done by the charterers. It was done under the supervision of the Captain; and the cases make no different rule where the charterers are also the owners, as in the instant case."

In view of these positive findings of fact, supported as they are by the evidence, this court will find that the Captain did supervise and boss the loading and trimming of the ship, and actually ordered more cargo than the stevedore thought wise, and ordered the cargo trimmed to port so that when the ship sailed there was more cargo on the port side than on the starboard (p. 12, Q. 36 p. 16, Q. 49–64).

II

THE STEAMSHIP NIDARHOLM WAS POSITIVELY UNSEAWORTHY AND WHOLLY UNFIT TO PROCEED TO SEA AT THE COMMENCEMENT OF THE VOYAGE.

This fact is no longer open to dispute. The District Court found it as a fact, saying on page 199:

> "Without going into more details of loading, it appears from the captain's testimony that the ship in calm weather and smooth water, while still within the harbor limits, was listed to her maximum angle of safety, and according to Carmichael, a disinterested witness, she was exceeding her angle of safety by 3 or 4 degrees. At every movement of the helm after the vessel left the dock up to the time of the loss, her list changed materially, and, immediately following a sharp movement of the helm, the cargo went off the port forward deck, abreast the foremast, at the place where the athwartship lashing proposed by the libellant should have been. It seems clear to me, even if the breaking of the stanchions and the lashing was the immediate cause of the cargo going over the rail, *that the list of the vessel was caused by her overloaded condition, over which the Captain must be held by law and in fact to have been responsible.* The Captain seems to have been unduly encouraged by the fact that he got safely to Portland on another trip when the ship had listed even more than on this trip; but he admits that the cargo on this trip was somewhat heavier than on the previous trip."

. . . "From the action of the ship in smooth water, I cannot escape the conclusion that she was unfit to face the perils of the sea along the exposed area of the Atlantic coast from Murray to Portland." (Italics ours.)

The Circuit Court of Appeals agreed with the District Court on this point, and on this question of seaworthiness the Circuit Court of Appeals, on page 207, said:

> "The facts are stated in the opinion of the District Judge and need not be repeated. (26 Fed. (2nd) 92.) His conclusions that the steamer *because of excessive loading and too much deck cargo was top-heavy and unseaworthy when she began the voyage,—faults for which her master was responsible,—were clearly correct.*"

Therefore both courts agreed that the ship was unseaworthy at the commencement of the voyage, and both courts found the master responsible for this condition.

(a) The loss was the direct result of this unseaworthiness.

The District Court found as a fact that the cause of the loss was the unseaworthiness of the vessel. On page 199 the District Court said:

> "I think the loss was occasioned solely by reason of the ship being overloaded, with a deck cargo improperly stowed, under the supervision of the master."

Although the District Court saw and heard all but two of the witnesses, the Circuit Court of Appeals failed to give proper consideration to the findings of fact made by the District Court, and the Circuit Court of Appeals found that the loss was caused partly by the unseaworthiness of the vessel, and partly by the insufficient strength of the cribbing, and the improper stowage of the cargo.

Now we say that if our interpretation of the cases cited on pages 13–16 above is correct, it is wholly immaterial whether

the District Court or the Circuit Court of Appeals is correct on its findings as to the cause of the loss, for we contend that it was the positive duty of the master of the ship, as the agent of the the owners, to make his ship not only seaworthy in hull and machinery, but seaworthy in respect to stowage and staying of the cargo.

That he did not do this is conclusively shown by the fact that the cargo went overboard within the harbor of Murray before the ship had encountered any sea perils.

III

THE SHIP IS RESPONSIBLE FOR LOSS CAUSED BY UNSEAWORTHINESS.

The law is clear that a ship must be seaworthy at the commencement of the voyage, and this means seaworthy not only in respect to hull and machinery, but also with respect to the preparation for and the stowage and staying of the cargo.

In the case of *Lawrence* v. *Minturn*, 17 How. 100, the Supreme Court, on page 115, said:

> "The master is bound to use diligence and skill in stowing and staying the cargo (speaking of deck cargo)."

As already stated, the fact that *the cargo was not properly stayed* is definitely proven by the fact it went overboard while the ship was in calm water in the inner harbor. *Lawrence* v. *Minturn* further holds that the shipowner is not responsible for the loss of a deck cargo brought about by a sea peril, and while the point is not raised in that case no other inference can be drawn from the opinion than that for loss caused by other than sea peril the ship is clearly responsible. In the same case, the Supreme Court, on pages 114, 115, further said:

> "The extent to which we understand them to go, and the law which we intend to lay down, is this: that if the vessel is seaworthy to carry a cargo under deck, and there was no

general custom to carry such goods on deck in such a voyage, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owners, or vessel, for a jettison rendered necessary for the common safety, by a storm, though that storm, in all probability, would have produced no injurious effect on the vessel if not thus laden."

On the same page the court further said:

"Applying these principles to the case before us, there is no difficulty in coming to a satisfactory conclusion. This vessel was uncommonly staunch and strong. The amount of dead weight on board was not excessive, for there is no pretense that she was too deep in the water. There was no apparent inability to carry the deck load when she sailed, not until heavy seas were encountered."

Can there be any doubt but the Supreme Court would, under its ruling in the Minturn case, hold this ship wholly responsible for the loss of the deck cargo in smooth water in the harbor, where, as the evidence shows, the vessel was overloaded and unseaworthy, and the loss was the direct result of this condition?

We say further that the case of *Lawrence* v. *Minturn* is direct authority for holding the ship owner responsible for any deck cargo lost through failure of the master to properly stay and secure the cargo from other than perils of the sea.

Referring to the authority of *Lawrence* v. *Minturn*, Judge Ward, speaking for the Circuit Court of Appeals for the Second Circuit, in the case of *Olsen* v. *United States Shipping Co.*, 213 Fed. 18, on pages 20 and 21, said:

"Likewise, when cargo loaded on deck by agreement is lost because of a peril of the sea the ship wil be excused. *Lawrence* v. *Minturn*, 17 How. 100, 15 L. Ed. 58. We are not willing to extend this to such a loading as makes the ship herself unseaworthy when no sea peril is encountered.

It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself. The District Judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by sea peril, but by her own instability. *It makes no difference whether this was due to the amount or the stowage of the deck load alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading;* insisted upon his taking the deck load or that surveyors certified that the ship could do so safely No doubt both thought so. That, however, did not lessen his duty, especially in view of the fact that he did not think so himself."

And on page 20, Judge Ward further said:

"The master accordingly moved the steamer astern to pick up her after anchor, without waiting to lash the forward deck load and in backing she struck the side of the bank. Some of the wooden uprights on the port side, fixed to keep the deck load in place, broke and twenty logs were thrown off. A survey was held which recommended that 279 more logs be discharged and the whole 299 logs rafted to Ship Island, to be reloaded there. The District Judge held that the expenses connected with the falling of the deck load at Gulfport should be divided between the owner and charterer, the former being at fault for not lashing the deck load and the latter for loading it. We think that it is chargeable to the owners only because the master should not have started to Ship Island until he had secured the forward deck load. *The accident was not due to the striking of the bank, but to the fact that the vessel was unseaworthy as to her forward deck load, a thing which it was the duty of the master to prevent.*" (Italics ours.)

The above case is in many respects on all fours with the case at bar, and the opinion of the Circuit Court of Appeals in the case at bar is in direct conflict with the Circuit Court of Appeals for the Second Circuit in the Olsen case.

In the case of *The Seguranca*, 250 Fed. 19, the Circuit Court of Appeals for the Fifth Circuit (construing a charter party, using practically the identical language as the charter in this case where it related to the Captain's supervision of the loading), stated that it was immaterial what caused the tenderness of the ship, whether it was overloading, or improper stowage of the cargo, because the master was responsible in the final windup to have his ship seaworthy on going to sea. And the court in that particular case held that the cause of the improper stowage was due partly to the master of the ship, and partly to the stevedore, as the Court of Appeals did in the case at bar, but the court in *The Seguranca* held the ship *solely* responsible for the loss.

On page 22, the Court of Appeals said:

> "The appellant claimed as an offset damage alleged to have been suffered by him because of improper loading of the Seguranca by the stevedores employed by the appellee as charterer, consisting in the expense of removal of part of the cargo and loss of revenue, claimed to have been due to shortage of cargo due to improper loading. *The evidence is conflicting as to whether the admitted tenderness of the ship after it was loaded was due to improper stowage of the cargo or to the alleged crankiness of the ship herself.* We find it unnecessary to determine as between these causes. Section 15 of the charter party provided that:
>
> " 'The charterers or their agents shall provide and pay a stevedore to do the stowing of the cargo under the supervision of the master.'
>
> "One Tracy was employed by the charterer to do the loading. His testimony is to the effect that the loading was done in a manner known to and approved by the

master, and that additional cargo of resin, a subject of complaint by the appellant, was put on the ship only after the intention to do so was made known by Tracy to the master, and that the master made no objection, until after it was loaded on the ship, and that the first objection or protest made by the master was after the ship was loaded and when a list became apparent. It is true that the evidence of the master, Dixon, is partly in conflict with Tracy's. The District Judge, after hearing the evidence of both, came to the conclusion that any improper stowing of cargo was due to the joint fault of the stevedore, Tracy, and the master, Dixon, and under the terms of the charter party, it was made the master's duty to supervise the stowing of the cargo. *Under these circumstances, we agree with the conclusion reached in the District Court that the appellant should take nothing by reason of this offset.*" (Italics ours.)

In the case of *The Dana*, 190 Fed. 650, the cargo was furnished by the charterer, and the amount put aboard was also determined by the charterer's agent, still the court held the ship responsible because the Captain did not refuse or reject to carry the amount offered, nor did he object to the way in which the load was placed on his vessel. The court held that the master held his vessel out as being able, loaded as she was, to satisfactorily carry the cargo to its destination.

On page 653, the court said:

"It appears that the load was furnished by the libellant and that the quantity offered was also determined by the libellant's agent, while the captain of the vessel only supervised, in a general way, the placing of the cargo, and indicated the quantity which he would undertake to carry. *Here, again, the master's actions were of a negligent character. He did not refuse or object to carry the amount offered, nor did he object to the way in which the load was placed upon his vessel. So it must be assumed that he undertook the*

voyage with the cargo in the condition in which it was put upon his vessel, and therefore that the vessel was held out to be seaworthy, to the extent of being able to undertake what her master undertook to do with her." (Italics ours.)

In the case of *Hamilton, et al.* v. *United States*, 268 Fed. 15, on page 21, the court said:

"Inherent in the shipping articles was the absolute obligation of the owners and operators to see that the vessel was seaworthy. To be seaworthy the vessel must be tight, staunch, and strong, and so equipped and the cargo so stored as to resist all ordinary action of the sea."

Poore on Charter Parties, Section 3, reads as follows:

"The seaworthiness of the ship is under the absolute control of the master. Neither he nor his owners are excused because the charterers load the ship in such a way as to make her unseaworthy."

IV

THE SHIP WAS RESPONSIBLE FOR THE LOSS (REGARDLESS OF THE LAW REQUIRING THE CAPTAIN TO MAKE HIS SHIP SEAWORTHY) BECAUSE THE CAPTAIN REFUSED TO PUT ON THE ATHWARTSHIP LASHING SUGGESTED BY THE CHARTERERS AND BECAUSE THE CAPTAIN ACTUALLY OVERLOADED HIS SHIP, THUS PLACING EXCESSIVE STRAIN ON THE CRIBBING.

The District Court found as a fact that the stevedore suggested the placing of an athwartship lashing running from the foremast to the stanchions, on each side, as shown in Exhibit 5, on page 187 of the record (note there are two pages 187). The District Court further found that the Captain declined to put such a lashing on.

On this phase of the matter, the District Court, on page 194, said:

> "It appears in evidence that the superintendent in charge of the plant at Murray recommended to the master that he put an athwartship lashing at the foremast, the same to go around the foremast and be made fast on the stanchions opposite the foremast. *This lashing the Captain refused to use on his first trip. It appears that the suggestion was renewed by the libellant's superintendent on the second trip and the Captain again refused to put it on: and it was on this trip that the loss occurred. It appears that on the third trip the lashing was put on.*" (Italics ours.)

Regarding the placing of this same lashing the Circuit Court of Appeals, on page 207, said:

> "He (the Captain) was consulted about the lashings and expressed the opinion that one leading from side to side at the foremast was unnecessary."

The finding of fact by the District Court should be conclusive, especially supported as it is by the evidence (p. 35, Q. 27–29). The cargo first started to go directly where this lashing would have been had the Captain not declined to use it. This alone might account for the loss if the list was caused by the shallow waters, as the owners want this court to believe.

(a) Unusual Strain Placed on Cribbing by Unseaworthy Condition of Ship

Let us assume, for the purpose of this argument, that the entire loading, up to the morning on which the ship sailed, was done wholly by the charterer without any suggestions or information from the master. Let us further assume, for the purposes of argument, that the charterer furnished the cribbing without any information from the master. It is clear that before loading was completed, the ship started to act cranky. That the stevedore became disturbed, and called the Captain at 3.50

in the morning. The Captain came on deck, ordered the loading stopped for a few minutes, tested the ship's tanks, then, against the advice of the stevedore, ordered more wood, 15 cords aft and 5 forward, and ordered the wood trimmed to port to overcome the starboard list (pp. 16–18, Q. 49–74). *Certainly the charterer* (no matter what his responsibility may have been heretofore) *had a right to rely explicitly on the judgment of the Captain as to whether or not the vessel would take more load, and where the load had to be placed.*

In the case of *The Kaupanger*, 241 Fed. 702, on page 705, the court said:

> "When Gilbert consulted with the master and in substance got his assurance that he could fill the ship on top of the stowage as it stood, he had the right to sound advice, which would have told him that she needed more ballast. The master's unsound advice was a fault, for the loss through which the owner is responsible to the extent of the subsequent failure to fill up to her capacity."

The strain placed on the cribbing by this cranky and unseaworthy ship was excessive, and even assuming that it was the charterer's duty and responsibility (which we deny) to furnish cribbing of sufficient strength, certainly the charterer could not be called upon to furnish cribbing that would withstand the strain placed upon it by an unseaworthy ship.

(b) Ship Was Actually Overloaded

The Nidarholm was down below her load marks and therefore actually had on more cargo than she was built to carry (Opinion of District Court, p. 195). See the case of *Lawrence* v. *Minturn*, *supra*, p. 17, where the Supreme Court held the vessel in that case was not overloaded.

V

AS A QUESTION OF LAW THE SHIP WAS SOLELY LIABLE ON THE FACTS AS FOUND BY THE CIRCUIT COURT OF APPEALS.

No proof is necessary to show that if the cargo had been properly loaded and stayed and the ship had been seaworthy, the cargo would not have gone overboard in the calm waters of the inner harbor as it did in this case. If our interpretation of the cases quoted above is correct, to the effect that it was the duty of the Captain to see that this cargo was properly stowed and his vessel seaworthy, and if the word *stayed*, in the opinion of *Lawrence* v. *Minturn*, *supra*, means stayed (held in place against all but perils of the sea), it must follow as a conclusion of law that the ship was solely responsible for this loss.

We therefore contend that on the facts as found by the Circuit Court of Appeals, regardless of the facts found by the District Court, the rulings of law made by the Circuit Court were erroneous and in direct conflict with the Circuit Court of Appeals for the Second Circuit in the Olsen case, *supra*, page 18, also contrary to the ruling of the Fifth Circuit in *The Seguranca*, *supra*, page 20, and directly contrary to the rulings of the Supreme Court in the case of *Lawrence* v. *Minturn*, *supra*, page 17.

CONCLUSION

The cases cited by the proctors for the Steamship Nidarholm such as the *Thomas P. Beal*, 11 Fed. (2nd) 49, *Oakley C. Curtis*, 4 Fed. (2nd) 979, and certain others are not in conflict with libellant's contention, but neither are such cases in point—those cases are practically all cases where the cargo was damaged, because of the place on the ship where it was stored, or because the containers were defective. In none of those cases was there

any question of the ship being cranky, or the cargo being lost by rolling overboard, whereas in the case at bar, both courts held the Nidarholm unseaworthy and the pilot said she could never reach Portland loaded as she was (p. 60, Q. 71–73).

Respectfully submitted,

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